

No. 85-1253

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

EAGLE-PICHER INDUSTRIES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the First Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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THE GOVERNMENT HAS MISCHARACTERIZED BOTH THE NATURE OF THIS CONTROVERSY AND THE NATURE OF EAGLE-PICHER'S CLAIMS.

The Government's brief in opposition to Eagle-Picher's petition for certiorari, like the decision which it seeks to defend, is founded upon mischaracterizations of the nature of this case and of Eagle-Picher's claims.¹ Lest this Court be misled by the Government's efforts here, several basic points need to be emphasized.

1. Section 905(b) of the Longshoremen's and Harbor Workers' Act, 33 U.S.C. § 905(b) (1982), authorizes suit by an LHWCA-covered employee against a vessel owner for injuries caused by the vessel owner's breach of certain duties of care imposed by federal maritime law. See *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 163 n.10, 165-67 & n.13 (1981); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 629-32 (1959).

Among other things, federal maritime law requires a vessel owner (i) to maintain his ship in a reasonably safe condition; (ii) to avoid exposing persons aboard the ship to hazards presented by areas or equipment within the control of the vessel owner; and (iii) to warn persons aboard the ship of any hidden dangers of which the vessel owner is aware. *Scindia Steam Navigation Co. v. De Los Santos*, *supra*, 451 U.S. at 167. A vessel owner's breach of any of those duties—which are precisely the duties that the United States is alleged here to have breached²—constitutes a “maritime tort.” Such a breach,

¹ The United States has filed a single, consolidated brief in opposition to the petitions for certiorari submitted (i) by Eagle-Picher in the instant proceeding and (ii) by Raymark Industries, Inc. and seven other parties in No. 85-1288. Both petitions seek review of the decision of the Court of Appeals for the First Circuit reported at 772 F.2d 1023. (Appendix, at 1a-17a.) A third, related petition for certiorari, currently pending before the Court in *Drake v. Raymark Industries, Inc.*, No. 85-1246, presents the same issue for review.

² It has been alleged here that the United States, owner of the vessels upon which the underlying plaintiffs were required to work,

when it causes injury to a maritime worker covered by the LHWCA, is actionable under Section 905(b).³

An LHWCA worker's negligence action against a vessel owner under Section 905(b)—so long as it satisfies the Act's "situs" and "status" tests and alleges the breach of federal maritime vessel-owner duties—*does*, by nature and definition, involve an actionable "maritime tort"—and the Government's repeated contention that Section 905(b) applies only to "maritime torts" (Brief . . . in Opposition, at 8-9, 14, 16, 20 nn.17-18) is simply a distractive red herring.

2. The issue presented here is *not* whether the torts allegedly committed by the United States are "maritime torts." The issue here, rather, is whether a Section 905 (b) plaintiff—in *addition* to being an "employee" "engaged in maritime employment" and "covered" by the LHWCA—and *in addition* to having suffered shipboard injury caused by the vessel owner's breach of federal maritime duties—must also satisfy extra-statutory criteria which relate only to the question of whether a dis-

(i) knowingly maintained unsafe conditions upon those ships by requiring the inclusion of asbestos in all insulation products used aboard the ships; (ii) negligently failed to implement known and available protective measures for the control of airborne asbestos dust, thereby constantly exposing those workers to unsafe concentrations of such dust; and (iii) failed to warn those workers of the extreme danger to which they were being exposed in the course of their maritime employment. *See, e.g.,* Appendix, at 49a.

³ Ironically, the court below itself paid lip service to the fact that "negligence actions that are brought against the shipowner pursuant to § 905(b) are governed by federal maritime principles." *In re All Maine Asbestos Litigation (PNS Cases)*, 772 F.2d 1023, 1029 (1st Cir. 1985) (Appendix, at 11a), *citing and paraphrasing* *Scindia Steam Navigation Co. v. De Los Santos, supra*.

Having said that, however, the court of appeals went on (i) to ignore the fact that the United States *is* alleged here to have committed federal maritime torts; (ii) to mischaracterize the claims involved here as garden-variety land-based product-liability claims; and (iii) to confuse substantive maritime law with subject-matter jurisdiction (*see* page 5 & n.5 *infra*). *See generally* Petition for Certiorari, at 8-11 & n.16.

strict court may exercise general admiralty subject-matter jurisdiction under 28 U.S.C. § 1333(1).

The Court of Appeals for the First Circuit itself recognized that its decision to superimpose the jurisdictional "nexus" requirement of *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), upon the express terms of the LHWCA conflicts directly with the decisions of at least two other courts of appeals. See *Drake v. Raymark Industries, Inc.*, 772 F.2d 1007, 1016-17 (1st Cir. 1975), *petition for cert. pending*, No. 85-1246 (filed Jan. 21, 1986).

The conflict between the decision below and *Hall v. Hvide Hull No. 3*, 746 F.2d 294 (5th Cir. 1984), *cert. denied sub nom. Avondale Shipyards v. Rosetti*, 54 U.S.L.W. 3212 (U.S. Oct. 7, 1985), and *McCarthy v. The Bark Peking*, 676 F.2d 42 (2d Cir. 1982), *vacated and remanded*, 459 U.S. 1166 (1983), *on remand*, 716 F.2d 130 (2d Cir. 1983), *cert. denied*, — U.S. —, 104 S. Ct. 1439 (1984), is indeed real and substantial, and can be resolved only by this Court.⁴

⁴ The Government effectively admits the conflict with *Hall*. (See Brief . . . in Opposition, at 19.) Its treatment of *The Bark Peking*—suggesting that that case dealt with LHWCA coverage only for purposes of workers' compensation and not for purposes of Section 905(b) (*id.* at 20 n.17)—is misleading, to say the least.

In *The Bark Peking*, the Court of Appeals for the Second Circuit clearly recognized that *the availability of the Section 905(b) vessel-owner remedy is coextensive with coverage under the LHWCA*.

In *The Bark Peking*, a worker injured while painting the mast of a museum ship brought an action, under Section 905(b), against the owner of the ship. The court of appeals recognized that any person covered by the Act (*i.e.*, "engaged in maritime employment") is entitled to maintain such an action under Section 905(b) (676 F.2d at 45); but it ruled initially that the plaintiff could not be deemed "covered" by the LHWCA because he failed to satisfy the LHWCA's own "status" test, since his work "bore no significant relationship to navigation or commerce on navigable waters" (*id.* at 45-46, *citing, inter alia, Executive Jet Aviation, Inc. v. City of Cleveland, supra*). This Court granted certiorari, and summarily vacated the judgment of the court of appeals, remanding the case for further proceedings in light of the then-recently decided *Direc-*

3. The Government's effort to reconcile the decision below with *Director, Office of Workers' Compensation Programs v. Perini North River Associates*, 459 U.S. 297 (1983), and *Perkins v. Marine Terminals Corp.*, 673 F.2d 1097 (9th Cir. 1983), begs the very issue presented by Eagle-Picher's petition.

Perini and *Perkins* both stand squarely for the proposition that *coverage* under the LHWCA is to be determined *without* reference to the *Executive Jet* "nexus" test. Again, the Government suggests that those cases deal only with the issue of LHWCA coverage "for purposes of receiving workers compensation" and not with the availability of a Section 905(b) action. (Brief . . . in Opposition, at 20 n.17). In so arguing, the Government purposefully ignores the fact that the statute expressly makes the Section 905(b) remedy available to *any* person "covered" by the Act. The statute clearly defines coverage *once* and for *all* purposes (see 33 U.S.C. § 903(a)); it simply does not admit of two, separate definitions of "coverage."

Consistent with the express terms of the statute (and its legislative history), at least two courts of appeals have ruled that the availability of the Section 905(b) remedy is *coextensive with coverage under the statute*. See *Hall v. Hvide Hull No. 3*, *supra*, 746 F.2d at 302-03; *McCarthy v. The Bark Peking*, *supra*, 716 F.2d at 132. *Perini* and *Perkins*, like *Hall* and *The Bark Peking*, hold that *coverage* under the statute—for *any* purpose—is to be determined *without* reference to the general admiralty jurisdictional criteria articulated by this Court in an entirely different context in *Executive Jet*.

tor, Office of Workers' Compensation Programs v. Perini North River Associates, 459 U.S. 297 (1983). See 459 U.S. at 1166.

On remand—and on the basis of this Court's ruling in *Perini*—the Court of Appeals for the Second Circuit ruled that the plaintiff was, indeed, "a covered employer under the LHWCA," "engaged in 'maritime employment'" under Section 902(3), and *therefore* entitled to "bring his action for damages under 33 U.S.C. § 905(b)." 716 F.2d at 132 (emphasis added).

4. Finally, the Government repeatedly ignores the difference between the substantive law of maritime vessel-owner torts—as embodied in Section 905(b) of the LHWCA (making the tort actionable), in *Scindia Steam Navigation Co. v. De Los Santos*, *supra* (defining the vessel owner's duties), and in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974) (allowing contribution in non-collision maritime cases)—and those separate and distinct principles which govern general admiralty subject-matter jurisdiction under 28 U.S.C. § 1333 (1). Section 1333(1) is simply not involved here,⁵ and the jurisdictional principles articulated by this Court in its construction of that statute in *Executive Jet* are not implicated.⁶

THE GOVERNMENT'S NEW FECA-BASED ARGUMENT IS WITHOUT MERIT, BUT HIGHLIGHTS THE NEED FOR REVIEW BY THIS COURT.

It is damningly ironic—but hardly surprising in light of the vulnerability of the decision below—that the first argument advanced by the Government in opposition to Eagle-Picher's petition is that the court of appeals reached the right result for the wrong reason. (Brief . . . in Opposition, at 14-15.)

Characterizing the reasoning of the court of appeals as “inappropriate” and “unnecessarily complicated” (*id.*

⁵ Subject-matter jurisdiction over the federal cause of action authorized by 33 U.S.C. § 905(b) is vested in the district courts by 28 U.S.C. § 1331. *Rex v. Cia. Pervana de Vapores, S.A.*, 493 F. Supp. 459, 467 (E.D. Pa. 1980), *rev'd on other grounds*, 660 F.2d 61 (3d Cir. 1981), *cert. denied*, 456 U.S. 926 (1982) (“An action arises under the laws of the United States if the complaint seeks a remedy expressly granted by federal law or if it requires the construction of federal legal principles for its disposition. . . . There can be no doubt that an action under § 905(b) of the LHWCA meets all of these requirements.”), *citing, inter alia, Griffith v. Wheeling-Pittsburgh Steel Corp.*, 610 F.2d 116 (3d Cir. 1979).

⁶ The Government has failed entirely to address the fact that *Executive Jet*, by its very terms, is limited to jurisdictionally ambiguous situations “in the absence of legislation to the contrary.” 409 U.S. at 274. *See* Petition for Certiorari, at 21.

at 15), the Government argues that Eagle-Picher's vessel-owner claims should have been dismissed on the basis of the following dicta in the decision below:

We doubt whether we can ignore an express congressional exclusion of federal workers from coverage under the LHWCA, and employ an FTCA analogy by which coverage can be analogically presumed so as to render the United States vulnerable to a shipowner negligence suit. . . . Where a provision of the FTCA excludes what would otherwise be a potential cause of action, no action against the government is permitted. . . . Moreover, where other federal policies, express or implied, preclude what would otherwise be a potential cause of action, no action against the government may stand. . . . But we shall bracket these FTCA-based concerns. . . .

772 F.2d at 1029-30 (Appendix, at 11a-13a).

There is absolutely no authority whatsoever for the proposition that any "implied" or unstated "federal policies" may be invoked to defeat the FTCA's express mandate that the United States be held accountable in tort "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. Nor do any of the cases cited by the court of appeals in the course of its dicta or by the Government in its brief in opposition here provide any authority for the assertion of such a proposition.

To the contrary, Congress carefully and expressly identified those situations in which the United States is *not* to be held liable in tort as if it were a private party; *all* such exceptions are carefully delineated in the statute. See 28 U.S.C. §§ 2671, 2680(a)-(g). Three of the cases cited by the First Circuit involved such express exceptions: (i) *United States v. Orleans*, 425 U.S. 807, 813-14 (1976) (independent contractors excluded from the definition of "Federal agency" under 28 U.S.C. § 2671); (ii) *Dalehite v. United States*, 346 U.S. 15, 30-31 (1953) ("discretionary function" exception under 28 U.S.C. § 2680(a)); and (iii) *United States v. S.A. Empresa de*

Viacao Aerea Rio Grandensa (Varig Airlines), — U.S. —, 104 S. Ct. 1755, 1762 (1984) (same).

Nor does *Laird v. Nelms*, 406 U.S. 797, 802-03 (1972), support the suggestion that a valid FTCA claim may be summarily defeated by the invocation of “other federal policies, express or implied.” To the contrary, *Laird v. Nelms* involved a straightforward issue of statutory construction—viz., whether Congress intended, by its use of the phrase “negligent or wrongful act or omission,” to subject the United States to strict-liability claims. This Court ruled, simply, that it did not.⁷

Finally, neither *Johansen v. United States*, 343 U.S. 427 (1952), nor *Patterson v. United States*, 359 U.S. 495 (1959), supports the Government’s position here. *Johansen* and *Patterson* hold, simply, that a FECA-covered federal employee may not sue the United States directly under the Public Vessels Act or the Suits in Admiralty Act. Neither involved claims under the FTCA, and neither even remotely suggests that any unstated “policy” considerations may be invoked to defeat the plain language of the FTCA. Under the FTCA, the United States is to be treated *as if it were a private party*—here, a private shipyard/vessel-owner—and:

Such a private shipyard would not be protected by the *Johansen/Patterson* doctrine, because the shipyard would not be covered by the FECA.

In re All Maine Asbestos Litigation, 589 F. Supp. 1571, 1576 (D. Me. 1984) (Appendix, at 25a). *Every court to*

⁷ Similarly, *Feres v. United States*, 340 U.S. 135 (1950), and *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977)—cited in a footnote to the decision below—also involved construction of the statutory language of the FTCA. In *Feres*, this Court ruled that, because of the uniqueness of the federal government’s relationship to the Nation’s armed forces, there exists no “private individual under like circumstances” within the meaning of the FTCA and, thus, no analogous private liability upon which to base FTCA liability for injuries to active-duty servicemen. 340 U.S. at 141-42. In *Stencel*, the Court simply extended its ruling in *Feres* to bar third-party actions involving injuries to active-duty servicemen for the same reason.

have addressed this "bracket[ed]" issue has so ruled. See generally *Petition for Certiorari*, at 7-8 n.14.⁸

⁸ The Government's criticism of both the district court and the court of appeals for adhering to the mandate of the FTCA and examining the liability of an analogous private shipyard/vessel-owner (Brief . . . in Opposition, at 14-16 & n.14) is not only unfounded but disingenuous as well.

The third-party complaint at issue here originally contained nine counts—seven of which asserted claims based on the common law of the State of Maine. See *Petition for Certiorari*, at 4 n.4. In seeking dismissal of those state-law claims, the Government argued successfully (i) that, under the FTCA, the liability of the United States must be determined by reference to the liability of a similarly situated private shipyard/vessel-owner; (ii) that, under Maine law, a private shipyard/vessel-owner is protected by the state workers' compensation statute from third-party state-law claims involving work-related injuries to its employees; (iii) that, even though the Federal Employees' Compensation Act ("FECA") does not prohibit such suits against the United States—see *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983)—the United States must be treated under the FTCA as if it were a private shipyard/vessel-owner; and (iv) that to hold otherwise would make the United States the *only* shipyard/vessel-owner in Maine subject to such third-party suit in the circumstances presented here, thereby defeating the congressional purpose of the FTCA that the federal government be held liable "in the same manner and to the same extent as a private individual under like circumstances." See *In re All Maine Asbestos Litigation (PNS Cases)*, supra, 589 F. Supp. at 1574 (Appendix, at 22a-23a). At the Government's urging, the court of appeals upheld the dismissal of those state-law claims for precisely the same reason. See 772 F.2d at 1028-29 (Appendix, at 9a-10a).

The very same reasoning, of course, requires that Eagle-Picher's federal vessel-owner claims be upheld. See 589 F. Supp. at 1576 (Appendix, at 25a-26a). See also *Johns-Manville Sales Corp. v. United States*, 622 F. Supp. 443 (N.D. Cal. 1985); *In re All Asbestos Cases*, 603 F. Supp. 599 (D. Hawaii 1984); *Colombo v. Johns-Manville Corp.*, 601 F. Supp. 1119 (E.D. Pa. 1984); *Petition for Certiorari*, at 5-7 & nn.13-14. To hold otherwise—as the Government now argues (Brief . . . in Opposition, at 14-15 & n.14)—would make the United States the *only* shipyard/vessel-owner in Maine (or, for that matter, in the Nation) *not* subject to federal third-party suit in the circumstances presented here. Such a result, as the Government itself argued below, would be unfair—and destructive of the congressional purpose of holding the United States

THIS COURT SHOULD NOT POSTPONE REVIEW OF THE ISSUE PRESENTED HERE.

The significance of this case is not disputed by the Government. (*See* Brief . . . in Opposition, at 20-21.) Instead, the Government suggests that review "at this time" is "unwarranted" for two reasons. (*Id.* at 20.)

First, the Government acknowledges that three district courts (in addition to the district court below) have *upheld* vessel-owner claims identical to those presented here. *Id.* It notes, however, that it has sought reconsideration of those three decisions, and it expresses hope that, ultimately, "the circuits will agree with the First Circuit" and that the decision below will then be consistent with those future decisions of the Third and Ninth Circuits. *Id.*

Eagle-Picher submits that the decision below is *now* in direct conflict with *existing* law in the Fifth and Second Circuits (*see* pages 3-4 *supra*) and that that decision cannot *now* be honestly reconciled with this Court's decision in *Perini* or the Ninth Circuit's decision in *Perkins* (*see* page 4 *supra*).

Those conflicts exist *now*, and they warrant this Court's attention *now*. Future decisions such as those hypothesized by the Government will *not* end the confusion which the decision below has created. To the contrary, in the absence of guidance from this Court, such future decisions will either further complicate the matter (if they—or some of them—agree with the Government) or further isolate the First Circuit in its mistreatment of the LHWCA (if they follow the teaching of *Perini*, *Perkins*, *Hall* and *The Bark Peking*). Both prospects cry out for prompt and dispositive action by this Court.

responsible "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674.

The alternative analysis now offered by the Government—"that the United States should be analogized to a private employer immune from direct suit by the FECA" (Brief . . . in Opposition, at 15-16 n.14)—is nonsensical; *no* private employer *anywhere* is immunized by FECA from direct suit under the LHWCA.

Finally, the Government argues that the 1984 amendments to the LHWCA—by which Congress overruled *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983), thereby prospectively precluding Section 905(b) actions where the negligent vessel owner is the injured worker's employer—somehow renders “review of this issue unwarranted at this time.” (Brief . . . in Opposition, at 20.)

As noted in Eagle-Picher's petition herein, the 1984 LHWCA amendments have *no* effect whatsoever upon the tens of thousands of instances in which the United States, as a vessel owner, caused injuries that were manifested prior to the effective date of those amendments. Nor do they affect in any way the very common situation in which ship-owner negligence causes injury to an LHWCA-covered worker employed by someone other than the vessel owner itself.

Litigation will obviously continue to arise under Section 905(b), and, unless this Court acts *now* to provide guidance, the lower courts will continue to be faced with the conflicts discussed hereinabove. Review of the matter by this Court is most certainly warranted at this time.

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